IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NATHANIEL ISH, Appellant.	No. 36562-6-II PART PUBLISHED OPINION

Armstrong, J. — Nathaniel Ish appeals his conviction of second degree felony murder for the beating-death of his girlfriend, Katy Hall. He argues that (1) the trial court erred in admitting certain custodial statements he made while he was drugged, (2) the trial court violated his right to confront the witnesses against him when it limited his cross examination of a jailhouse informant, (3) the prosecutor committed misconduct by vouching for the informant's credibility, (4) the trial court erred in admitting the recorded telephone call a family member made shortly after the killing because of (a) discovery violations, (b) the hearsay rule, (c) the Privacy Act, chapter 9.73 RCW, (d) the State's failure to authenticate documents concerning the call, and (5) his attorney ineffectively represented him by proposing a jury instruction that incorrectly defined "recklessness." In a statement of additional grounds (SAG), Ish raises several additional issues. We find no reversible error and, therefore, affirm.

FACTS

Ish and Katy[1] met in a drug treatment program and started a romantic relationship. They left the program early to move in with Katy's elderly mother, Ilona Lynn, who was disabled.

[1] Because several people in this case have the last name "Hall," we refer to Katy Hall and her family by their first names.

After a few months, they relapsed into using drugs.

One night, around 9:00 p.m., Lynn heard "bumping noises" in Katy's and Ish's bedroom.[2] Report of Proceedings (RP) (July 10, 2006) at 18. Lynn, who was in a wheelchair, was able to partially open the bedroom door and saw Katy inside lying on the floor, drenched in blood. Lynn called Katy's children, Brittanee and Jack, who arrived within a few minutes. Brittanee yelled for her mother through the closed bedroom door, and Ish answered angrily from inside, "Look what you did. I killed her. . . . Come in and see." RP (May 2, 2007) at 274. When Jack entered the house, he heard banging sounds inside the room like someone hitting the walls. Jack yelled, "Nathan where is my mom?" Ish responded, "I killed her." RP (May 2, 2007) at 330-31. Jack wheeled Lynn out to the porch, and then Ish came out of the room, hit the pantry door and yelled, "I killed your mother. . . . She was bothering me, so I took care of business." RP (May 2, 2007) at 334.

Ish came out on the porch and threatened to kill Jack and his aunt and uncle, Rafaela and Michael Smith, who had arrived a few minutes earlier. Ish sat down next to Lynn, saying that God "made him do it" and stroking Lynn's hair. RP (May 3, 2007) at 474. The family members described Ish's behavior as "bizarre," "[o]ut of touch with reality," "crazy," and "radically different from anything [they] had ever seen before." RP (May 2, 2007) at 305; RP (May 3, 2007) at 481-82.

When the police arrived, four officers got involved in a "very chaotic" and "pretty violent struggle on the ground" with Ish while attempting to handcuff him. RP (May 3, 2007) at 412. Two officers testified that Ish had "superhuman strength" and was completely out of control. RP

[2] Lynn testified by video deposition because she passed away before trial.

(May 3, 2007) at 415, 551. Ish was also saying "something about Jesus . . . [but] a little incoherent," including that "[they] were all going to hell." RP (May 3, 2007) at 415. The officers twice tased Ish with little or no effect. Even after the officers handcuffed Ish, he continued to kick and fight so violently that they bound his legs at the ankles and knees and carried him to the patrol car. Ish started spitting, so they put a "spit sock" over his head. RP (May 3, 2007) at 528. He was also screaming incoherently and making "animalistic noises." RP (May 7, 2007) at 606. He stated, "I touched her blood. I touched it," RP (May 2, 2007) at 286, "Katie killed them all. Katie poisoned Ilona," RP (May 2, 2007) at 339, and "My heart is ripped out. I can feel my – my heart is bleeding." RP (May 2, 2007) at 339. During the ride to the police station, Ish stated, "Katie, look what I did. I am going to kill you. Katie, I am going to kill Jesus." RP (May 3, 2007) at 530. Then he said, "Edie, see what I did? I am going to kill you, Edie, just like that. It feels good." RP (May 3, 2007) at 530.

Later, police accompanied Ish in an ambulance to the hospital for treatment of his hand wounds. In the ambulance, Ish broke free of one of his leg restraints, "bucking [and] jumping wildly." RP (May 7, 2007) at 606. The police tased him again with little effect. Numerous police and medical personnel attempted to restrain Ish. But they were unable to calm him until medical staff injected him with a sedative. Ish slept for about two hours. Although the medical staff told the police that Ish had unknown amounts of cocaine, methamphetamine, and marijuana in his system, the police nonetheless questioned him when he woke up. Ish admitted that he "slapped" Katy the night before. He also remembered Katy hitting her head on a bed frame and bleeding quite a bit.

A. Procedural History

The State charged Ish with one count of first degree premeditated murder and one count of second degree felony murder on March 30, 2005. Ish was held in the Pierce County Jail, but the State did not arraign him because it wanted to first conduct a competency examination at Western State Hospital. The hospital found Ish competent on July 28, 2005. The trial court arraigned Ish three months later on October 20, 2005. According to the prosecutor, delays had occurred in (1) getting Ish out to Western State, (2) getting the evaluation done, and (3) conducting an independent expert evaluation the defense requested.

Ish's trial began on April 16, 2007, 16 months after his arraignment. Our record is incomplete. It shows March 30, 2006, more than 60 days after Ish's arraignment on October 20, 2005, as the first hearing after he was arraigned. The trial court later continued Ish's trial to July 10, 2006, but our record does not show a timely trial setting following July 10. Our record does reflect, however, that Ish appeared in court a number of times on various matters including continuances, an affidavit of prejudice, "an ongoing evaluation of the defendant and some other discovery issues," and an amended information RP (Apr. 10, 2006) at 3.

B. CrR 3.5 Motion to Exclude Custodial Statements

Before trial, Ish moved to suppress his statements to the police officers at the hospital, arguing that they were involuntary because he was so heavily drugged.[3] The trial court conducted a CrR 3.5 hearing on the issue.

[3] At the time, the identity and specific effects of the "sedative" that had been used were unknown. Later at trial, however, the emergency room physician, Dr. Stephen Friedrick, testified that the drug was Haloperidol, or Haldol, an antipsychotic drug that acts as a "strong sedative." RP (May 16, 2007) at 1347. He also testified that he gave Ish double the normal amount, but that Haldol does not alter a person's sense of reality.

Officer Jeff Martin had attended Ish while he slept off the sedative. Martin testified that when Ish awoke, he "appeared very calm, very normal" and asked Martin why he was there. RP (Apr. 16, 2007) at 17. When Martin asked him how he was feeling, Ish said he was a little bit sore and his arm hurt. Because Ish "appeared to be back to a semi[-]normal state of coherency," Martin decided to question him. RP (Apr. 16, 2007) at 18. Martin read Ish his *Miranda*[4] rights, which Ish said he understood and wanted to waive. Martin testified that he "had no reason to believe" that Ish did not understand what was going on; his eyes were open, and he appeared alert. RP (Apr. 16, 2007) at 20.

When Martin asked Ish if he knew who Katy Hall was, he said she was his girlfriend of six months. Ish then asked, "How is she?" RP (Apr. 16, 2007) at 21. Martin asked whether Ish had been using any street drugs that night and he responded, "No, just alcohol." RP (Apr. 16, 2007) at 21. Martin described the conversation as "fairly normal"; Ish was "very calm, polite, totally opposite from what we had observed earlier in the night." RP (Apr. 16, 2007) at 21-22. Later, Ish thanked Martin for watching over him.

Martin called Sergeant Christopher Lawler to interview Ish. Ish slept while they waited for Lawler. Lawler and Detective Rich Hall read Ish his *Miranda* warnings again, and Ish again agreed to speak with them. Lawler, Hall, and Martin testified that while Ish seemed "groggy," he was coherent, calm, attentive, and alert enough to answer questions appropriately. RP (Apr. 16, 2007) at 48.

The trial court found that given "the quality of [Ish's] responses, the timeliness of them, the tracking, everything seems to suggest that he did understand that he was capable of making a

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

decision to speak to the officers and doing so voluntarily, and in the process, making a knowing waiver of his rights." RP (Apr. 17, 2007) at 165. It found that Ish had voluntarily talked with the officers and denied his motion to suppress.

C. David Otterson

At trial, the State called David Otterson, Ish's cellmate at the Pierce County Jail. Otterson testified that Ish told him various details about Katy's death, including that he had used methamphetamine and crack that day. Ish admitted to sometimes "black[ing] out" from anger, and that on the day of the incident, "he had blacked out so bad that he was literally, felt like he was punching holes through [Katy]." RP (May 9, 2007) at 1093, 1095. But according to Otterson, Ish said that "he was going to just say he didn't remember anything at all that happened that night, just like it never happened." RP (May 9, 2007) at 1095.

Two issues arose regarding the details of Otterson's plea agreement with the State. First, the defense sought to cross examine Otterson about the agreement's requirement that he take a polygraph test if the State asked him to, which the State never did. Counsel wanted the jury to infer that "the State themselves don't necessarily have faith in [Otterson's] credibility." RP (Apr. 17, 2007) at 183. The trial court ruled that the prosecutor's opinion of a witness's credibility was irrelevant and inadmissible, so it required the State to redact the polygraph term from the agreement exhibit.

Second, the State sought to establish that in his plea agreement, Otterson promised to testify truthfully. The trial court ruled that the State could not vouch for the truth of Otterson's testimony, but that the term could be "point[ed] out" because "[o]therwise, the defense will be

dangling the possibility that the State has an agreement that says, 'You can lie as much as you want to. We just want you to get up there and testify.'" RP (May 9, 2007) at 1082.

During his cross examination, Otterson admitted that he had violated several terms of his plea agreement, including that he would reside at the same address, not use alcohol or drugs, and not commit any crimes. He also acknowledged that the State had to issue a material witness warrant to compel him to testify against Ish. On redirect examination, the State asked:

> Q . . . In terms of the agreement you reached with the State, . . . do you know if in fact that agreement is going to be revoked or not?
> A No, I don't.
> Q One of the terms of your plea agreement, which [defense counsel] has gone over with you, is that you testified truthfully?
> A Yes.
> Q Have you testified truthfully?
> A Yes, I have.

RP (May 10, 2007) at 1153.

During the defense attorney's closing argument, he stated that "[i]t is the desire of the State to take away from [Ish] that which we as a society hold more precious than gold or silver. It is his freedom." RP (May 21, 2007) at 1437. The prosecutor responded during rebuttal:

> Counsel talked to you about making a statement; that what the goal of the State is to deprive the defendant of his freedom. And that's an interesting comment because is that in fact the goal of a prosecution? Isn't the goal of a prosecution to seek justice, to seek the truth?

RP (May 21, 2007) at 1473. Defense counsel successfully objected to the last sentence, and the trial court struck it.

D. Lifeline Evidence

On the sixth day of trial, the prosecutor notified the trial court and the defense that Ish's

statements on Lynn's porch had been recorded. Lynn subscribed to a "personal emergency response" service run by the Philips Lifeline Company and wore a "personal help button" around her neck. RP (May 16, 2007) at 1301. The night of the killing, after Jack wheeled Lynn out to the porch, she pushed the button, which sent a signal to Lifeline to open up a line of communication similar to a phone call on a speaker phone. A Lifeline employee recorded conversations with both Lynn and Ish before the police arrived. In the recording, Ish sounds relatively coherent and rational.

The prosecutor learned about the recording from Raphaela Smith after the trial had begun and immediately notified defense counsel. The State obtained a copy of the recording on the sixth day of trial and gave the defense a copy the next day. The State proposed to authenticate the Lifeline recording through (1) testimony by Mike Smith, who would identify each voice in the recording, (2) testimony by Mark Van Gemert, a Lifeline account and marketing manager, who would explain how the service worked and establish that Lynn was a subscriber through a Lifeline care plan agreement form printout, and (3) a case history printout from Lifeline with a description of a call on the day of the incident.[5]

1. Lifeline Plan Agreement Form

Ish objected to the Lifeline care plan agreement form printout, which the State offered to show that Lynn was a Lifeline subscriber. Van Gemert testified that Lifeline could not have generated the printout if Lynn had not opened an account. Ish objected because Van Gemert had testified at one point that the printout *was* Lynn's underlying contract, but it did not contain Lynn's signature; the only signed copy of the agreement was in a Lifeline warehouse. The trial

[5] This printout was ultimately excluded from trial under the hearsay rule.

court overruled the objection because Van Gemert's testimony was sufficient to establish that the document was what the State claimed: a record of Lynn's account with Lifeline.

2. Lifeline Recording

Ish also moved to exclude the recording on three grounds. First, he argued that his discovery and due process rights had been violated because even though the prosecutor had not known about the recording, the police learned of it shortly after the incident and had not immediately informed the parties. Second, he argued that the recording was hearsay and the State could not show its admissibility under the business record exception. Third, Ish argued that Lifeline violated the Privacy Act, chapter 9.73 RCW, when it recorded the conversations without his consent.

The trial court denied the motion. First, it ruled there was no Privacy Act violation because (1) the conversation on the porch was not private because it was "being screamed out to the world" and (2) the exception for emergency communications applied. RP (May 15, 2007) at 1264; *see* RCW 9.73.030(2)(a). Second, the trial court ruled that the recording was not admissible hearsay because (1) it contained Ish's own statements, (2) it was being offered to show Ish's mental or emotional state, not the truth of the statements, (3) it established the res gestae of the events as they happened, and (4) any statements by people other than Ish and offered for their truth would fall under the excited utterance hearsay exception. *See* ER 801(d)(2); ER 803(a)(2), (3). Finally, the trial court ruled that the State had not deprived Ish of due process because it did not have the recording before and had no duty to acquire it. The trial court also concluded that the State had produced enough evidence to authenticate the recording despite defense counsel's

suggestion that it could have been altered. The State played the recording to the jury.

E. Jury Instructions

Defense counsel proposed a jury instruction defining recklessness based on 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (WPIC) 10.03, at 153 (2d ed. 1994):

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> *Recklessness also is established if a person acts intentionally or knowingly*.

Clerk's Papers at 109 (emphasis added). The trial court gave the instruction without objection from either party.

The jury convicted Ish of (1) first degree manslaughter on Count One and (2) second degree felony murder on Count Two. The trial court entered judgment only on Count Two, vacating the first degree manslaughter conviction. It calculated an offender score of three based on three out-of-state felonies without objection from either party, it then imposed a prison sentence at the high end of the standard sentencing range, 254 months. The trial court also imposed 24-48 months of community custody.

ANALYSIS

I. Vouching for Otterson's Credibility

Ish argues that the prosecutor improperly vouched for Otterson's credibility when she elicited that his plea agreement (1) required him to testify truthfully and (2) could be revoked if he breached it. He also argues that the prosecutor compounded the problem by telling the jury during closing argument that the prosecution's goal was "to seek justice" and "to seek the truth." RP (May 21, 2007) at 1473. To prevail on a claim of prosecutorial misconduct, a defendant must

show that the claimed improper conduct prejudiced him. *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), *cert. denied*, 127 S. Ct. 2986 (2007).

Ish relies on *United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980), which articulated a "strong case . . . for excluding a plea agreement promise of truthfulness":

> The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.

But the quoted language is dicta because the court was merely giving "guidance" to the trial court on remand.[6] *Roberts*, 618 F.2d at 535. Nevertheless, Division One appears to have adopted the *Roberts* dicta in *State v. Green*, 119 Wn. App. 15, 24, 79 P.3d 460 (2003). In *Green*, the witness testified under an immunity agreement that required the witness to "testify truthfully" with the stated purpose of "secur[ing] the true and accurate testimony" of the witness. *Green*, 119 Wn. App. at 24. The prosecutor did not call attention to either provision during questioning or in his closing argument, but he offered the entire agreement as an exhibit without redactions. *Green*, 119 Wn. App. at 22. Division One held that the trial court should have redacted the two truthfulness provisions from the agreement because they were "prejudicial and improperly

[6] The *reversible* error in *Roberts* was more than merely mentioning the witness's duty to testify truthfully under the plea agreement. During closing argument, after emphasizing the consequences that the witness would suffer if he breached the agreement by lying, the prosecutor stated that the detective on the case had been sitting in the courtroom during the witness's testimony, clearly suggesting that his purpose was to monitor the testimony and assure that the witness was in fact testifying truthfully. *Roberts*, 618 F.2d at 533-34. The Ninth Circuit held that the prosecutor had vouched for the witness's credibility by improperly referring to *facts outside the evidence*. *Roberts*, 618 F.2d at 533-34. Specifically, with the monitoring argument, the prosecutor intended the jury to believe that the detective (1) had personal knowledge of relevant facts and (2) was satisfied that the witness had testified to them accurately. *Roberts*, 618 F.2d at 534.

vouched for [the witness's] veracity." *Green*, 119 Wn. App. at 24.

We decline to follow *Green* or the dicta in *Roberts*. While it is improper for a prosecutor to vouch for the credibility of a witness, no prejudicial error arises unless counsel clearly and unmistakably expresses a personal opinion as opposed to arguing an inference from the evidence. *State v. Warren*, 165 Wn.2d 1730, 195 P.3d 940, 946 (2008) (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)), *cert. denied*, ___ U.S. ___, WL 453459 (Apr. 20, 2009). No such opinion was apparent here.

The circumstances here are similar to those in *State v. Kirkman*, 159 Wn.2d 918, 925, 155 P.3d 125 (2007), a child rape case where a detective testified that before he interviewed the victim, he elicited the victim's promise to tell the truth. On appeal, the defendant argued that the officer had vouched for the victim's credibility. Although the issue in *Kirkman* was whether the testimony amounted to manifest error of constitutional magnitude, the court's analysis is helpful because it focused on whether the testimony was error at all, not the possible level of harm: "[the detective's] testimony is simply an account of the interview protocol he used to obtain [the victim's] statement." *Kirkman*, 159 Wn.2d at 931. Thus, the testimony "'merely provided the necessary context that enabled the jury to assess the reasonableness of the . . . responses.'" *Kirkman*, 159 Wn.2d at 931 (quoting *State v. Demery*, 144 Wn.2d 753, 764, 30 P.3d 1278 (2001)). Similarly here, the testimony that Otterson's plea agreement required him to testify truthfully merely set the context for the jury to evaluate his testimony. The trial court did not abuse its discretion in admitting that evidence.

A majority of the panel having determined that only the foregoing portion of this opinion will

be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II. Admissibility of Custodial Statements

Ish argues that the trial court's admission of his custodial statements violated his privilege against self-incrimination under the United States and Washington constitutions.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."[7] U.S. Const. amend. V. This amendment contains two requirements before incriminatory statements made during custodial interrogations may be admissible. *State v. Vannoy*, 25 Wn. App. 464, 467, 610 P.2d 380 (1980). First, the statements must be voluntarily given and not the product of coercive police techniques. *Vannoy*, 25 Wn. App. at 467. Second, the defendant must have waived his rights after being advised of them according to *Miranda*, 384 U.S. 436. *Vannoy*, 25 Wn. App. at 467.

A. Voluntariness

Ish argues that the State failed to prove that his custodial statements were voluntary under the due process clause because the unknown sedative, alcohol, and illegal drugs he had taken "may have rendered him artificially compliant" before questioning. Br. of Appellant at 19.

In considering whether the defendant voluntarily spoke with the police, the court must consider all the circumstances surrounding the defendant's giving of the statement. *State v. Aten*,

[7] The privilege against self-incrimination is also protected by article 1, section 9 of the Washington Constitution, which provides that "[n]o person shall be compelled in any criminal case to give evidence against himself." Washington courts interpret the federal and state provisions equivalently. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

130 Wn.2d 640, 663-64, 927 P.2d 210 (1996). These include the defendant's physical condition, age, mental abilities, physical experience, and police conduct. *Aten*, 130 Wn.2d at 664. The court should also consider the defendant's mental disability and use of drugs at the time of a confession, but those factors do not necessarily render a confession involuntary. *Aten*, 130 Wn.2d at 664. Where substantial evidence supports a finding that the defendant voluntarily made the statement, we will not overturn the decision on appeal. *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988).

Here, substantial evidence supports the trial court's finding that Ish voluntarily spoke with the police officers at the hospital. The trial court considered the circumstances surrounding the interrogation, particularly the officers' descriptions of "the quality of [Ish's] responses, the timeliness of them, [and] the tracking" to find that Ish had been capable of deciding to talk to the police. RP (Apr. 17, 2007) at 165. And Ish's argument that the officer's testimony "did not provide any insight" into the effect of the drugs, Br. of Appellant at 20, is not persuasive; the court may consider circumstantial evidence as well as direct evidence. *See Rogers Potato Serv., LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004). The trial court was aware of the drugs in Ish's system, but it concluded that the sedative had neutralized the intoxicating effects of the other drugs and made him more rational rather than less. Medical testimony about the possible interplay of the drugs in Ish's system was not necessary. The question was whether Ish understood his surroundings and the police officer's questions and then responded appropriately. The evidence supports the trial court's conclusion that Ish understood the circumstances and responded appropriately.

Ish relies on *Townsend v. Sain*, in which the United States Supreme Court held that "drug-induced statement[s]" may be inadmissible because they are "not 'the product of a rational intellect and a free will.'" *Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963) (quoting *Blackburn v. Alabama*, 361 U.S. 199, 208, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960)), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992). *Townsend* is inapplicable because there, the trial court did not even consider whether the defendant's statements were drug-induced. And in remanding, the court specifically noted that the lower court must consider "many relevant circumstances . . . in determining whether the injection of scopolamine caused [the defendant] to confess. Among these are his lack of counsel at the time, his drug addiction, the fact that he was a 'near mental defective,' and his youth and inexperience." *Townsend*, 372 U.S. at 308 n.4. Here, the trial court considered the drugs in Ish's system and found that Ish's statements were not drug-induced. The trial court did not err in ruling that Ish voluntarily talked with the police.

B. Waiver of *Miranda* Rights

Ish also argues that the State failed to establish that he voluntarily waived his *Miranda* rights.

Before the police can interrogate a suspect in custody, they must advise the suspect of his rights under the Fifth Amendment. *Miranda*, 384 U.S. at 479. The suspect may waive his rights and agree to speak with law enforcement, but if he has no attorney, the State bears a "heavy burden" of showing that the waiver was knowing, voluntary, and intelligent. *State v. Earls*, 116 Wn.2d 364, 378-79, 805 P.2d 211 (1991). The State meets this burden if it can prove the

voluntariness of the statement by a preponderance of the evidence. *Earls*, 116 Wn.2d at 379 (citing *Lego v. Twomey*, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972)). The trial court considers all the circumstances surrounding the waiver in deciding whether it was voluntary. *Earls*, 116 Wn.2d at 379. We will not disturb the trial court's decision if substantial evidence supports it. *State v. Athan*, 160 Wn.2d 354, 380, 158 P.3d 27 (2007).

Here, again, substantial evidence supports the trial court's finding and conclusion that Ish knowingly, voluntarily, and intelligently waived his right to remain silent. The officers who questioned him testified that although Ish was groggy, he was aware of what was going on, appeared alert and coherent, was able to track their questions, and answered appropriately with explanations. These facts support the trial court's ruling that the drugs in Ish's system had not "diminished [his] free will" exercised by waiving his rights. Br. of Appellant at 24. The trial court did not err in so concluding.

III. Confrontation of Otterson

Ish argues that the trial court violated his constitutional right to confront the witnesses against him when it limited his cross examination of Otterson. Specifically, he contends that he was entitled to cross examine Otterson about the State's decision not to require him to take a polygraph test to make sure he was being truthful.

Both the federal and state constitutions guarantee the right to confront adverse witnesses. U.S. Const. amend VI; Wash. Const. art. I, § 22; *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The most important component of this right is the right to conduct a meaningful cross examination of adverse witnesses. *Darden*, 145 Wn.2d at 620. Because cross examination

is intended to test the perception, memory, and credibility of witnesses, courts zealously guard the defendant's right to conduct it. *Darden*, 145 Wn.2d at 620 (citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

The right to cross examine adverse witnesses is not absolute, however. *Darden*, 145 Wn.2d at 620 (citing *Chambers*, 410 U.S. at 295). Courts may limit cross examination if the evidence sought is vague, argumentative, or speculative. *Darden*, 145 Wn.2d at 620-21 (citing *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965)). The confrontation right is also limited by general considerations of relevance. *Darden*, 145 Wn.2d at 621; *see* ER 403. And because the issue here ultimately is the trial court's ruling on the admissibility of evidence, we review that ruling for an abuse of discretion. *Darden*, 145 Wn.2d at 619.

Ish argues that the State's failure to conduct a polygraph test on Otterson is relevant to Otterson's credibility. He reasons that (1) the Pierce County prosecuting attorney "never enforces" its requirement that informants submit to polygraphs, (2) Otterson knew that the clause would never be enforced, and (3) therefore, Otterson's promise to testify truthfully was an "empty promise." Br. of Appellant at 26-27. This argument lacks merit because the record supports neither of its factual premises. Ish offered no evidence that the prosecutor "never enforces" these provisions, or that if so, Otterson knew of the practice.

Moreover, Ish offered different logic to the trial court. There, he argued that he wanted to question Otterson about whether the State asked to take a polygraph so the jury could infer that "the State themselves don't necessarily have faith in [Otterson's] credibility." RP (Apr. 17, 2007) at 183. The trial court correctly ruled that the prosecutor's opinion of a witness's

credibility is irrelevant and inadmissible. *See Warren*, 165 Wn.2d at 30. The trial court did not abuse its discretion in excluding cross examination about the State's failure to ask Otterson to take a polygraph.

IV. Admission of Lifeline Contract and Recording

Ish argues that the trial court erred in admitting the Lifeline recording and care plan agreement form because (1) the prosecutor had failed to provide it in discovery, (2) it was hearsay, (3) it violated the Privacy Act, and (4) the State failed to properly authenticate it. We review a trial court's evidentiary rulings for an abuse of discretion. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 691, 101 P.3d 1 (2004).

A. Discovery Violation

Ish argues that the prosecutor's failure to disclose the Lifeline recording until the middle of trial violated CrR 4.7 and his constitutional right to due process. It is undisputed that no one in the prosecutor's office knew of the Lifeline recording until the trial began, and that when the prosecutor learned of it, she promptly notified the defense as required by CrR 4.7(h)(2). But Ish argues that the State violated CrR 4.7 and the due process clause because the Lakewood Police Department knew about the recording much earlier.

1. CrR 4.7

CrR 4.7(a) requires the State to disclose to the defendant information "within the knowledge, possession or control of members of the prosecuting attorney's staff." CrR 4.7(a)(4). The rule clearly applies only to the prosecutor's staff, not to the Lakewood Police Department. Thus, the rule does not cover information known to the police department but not the

prosecutor's staff.

2. Due Process

The prosecution has a constitutional duty to disclose all evidence in its possession that might be favorable to the defense. *State v. Lord*, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007) (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). That duty includes anyone working on the State's behalf, including the police. *Lord*, 161 Wn.2d at 292 (citing *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)). Here, the police knew only that the Lifeline recording existed; they did not know whether it was favorable to the defense or to the State. The police had no duty to help Ish obtain the recording, *State v. McNichols*, 128 Wn.2d 242, 249, 906 P.2d 329 (1995), but because it might have been favorable to the defense, the police should have notified Ish of the recording.

Nonetheless, we will reverse a conviction for the State's failure to disclose information in a timely manner only where a reasonable probability exists that, had the evidence been disclosed earlier, the trial result would have differed. *Wood v. Bartholomew*, 516 U.S. 1, 5, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995); *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 428, 114 P.3d 607 (2005). This inquiry turns on whether the absence of the evidence undermines our confidence in the verdict. *Woods*, 154 Wn.2d at 429 (citing *Kyles*, 514 U.S. at 434). And because the recording was not exculpatory but favored the State, it does not undermine our confidence in the verdict. Ish was not deprived of due process by the admission of the recording.

B. Hearsay

Ish argues that the trial court erred in relying on the "res gestae" exception to overrule his

hearsay objection to the recording. But the trial court also ruled that the recording was not hearsay because it was offered not for the truth of its statements but to establish Ish's state of mind immediately after he committed the crime, a valid exception to the hearsay rule. ER 803(a)(3).

C. Privacy Act

Ish maintains that the trial court's admission of the recording violated RCW 9.73.050 because he, as a participant in the conversation, did not consent to the recording as RCW 9.73.030(1)(b) requires. The court ruled the recorded statements admissible under the exception in RCW 9.73.030(2)(a) for conversations "of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster." RP (May 15, 2007) at 1264. In such cases, consent of only one party is necessary. RCW 9.73.030(2).

Lifeline provides a personal emergency response service in which subscribers wear a panic button around their necks so they can get emergency help. Lynn, the subscriber, did just that, activating the panic button because she saw her daughter bleeding on the floor. The trial court did not abuse its discretion in ruling that the exception for emergencies applied.

D. Authentication

Ish argues that the trial court erred in admitting the Lifeline care plan agreement form and the Lifeline recording because the State did not properly authenticate them. ER 901(a) provides that "authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

1. Lifeline Care Plan Agreement Form Printout

The State offered the Lifeline printout to establish that Lynn subscribed to the Lifeline service because the record would not exist had she not opened an account. Ish argues, without citation to authority, that the document was not authentic because it was not the original copy of the customer agreement and was not signed by Lynn. Presumably these arguments are based on the best evidence rule, *see* ER 1003, but that rule does not apply because the printout was not offered as Lynn's actual customer agreement; rather, it was circumstantial evidence that such an agreement had been signed.

2. Recording

A sound recording need not be authenticated by a witness with personal knowledge of the events recorded. *State v. Williams*, 136 Wn. App. 486, 500, 150 P.3d 111 (2007). Rather, the trial court may consider any information sufficient to support a prima facie showing that the evidence is authentic. *Williams*, 136 Wn. App. at 500. Where the recording is of a telephone call, generally the proponent of the evidence must establish the identity of each party to the call with either direct or circumstantial evidence. *State v. Rodriguez*, 103 Wn. App. 693, 701, 14 P.3d 157 (2000), *aff'd on other grounds*, 146 Wn.2d 260 (2002). Where the party called is a business, that party is identified if the call was (1) made to the number assigned at the time by the telephone company to that business and (2) related to business reasonably transacted over the telephone. ER 901(b)(6)(ii).

In this case, Michael Smith identified Lynn's and Ish's voices in the recording. Van Gemert established that Lynn subscribed to Lifeline. The State also produced a case history printout from Lifeline, which described a call on the day of the incident that was consistent with

the recording. Although the trial court excluded that printout for hearsay reasons at trial, it properly considered it for purposes of authentication. *See Williams*, 136 Wn. App. at 500 (ER 901 does not limit the type of evidence allowed to authenticate a document, nor is the trial court bound by the rules of evidence). Overall, this circumstantial evidence was sufficient to authenticate the Lifeline recording; the trial court did not abuse its discretion in admitting it.

V. Ineffective Assistance of Counsel

Ish argues that his attorney ineffectively represented him by proposing a jury instruction that erroneously defined "recklessness." To establish that his counsel ineffectively represented him, Ish must show that (1) his attorney's performance was so deficient that it "fell below an objective standard of reasonableness" and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). We presume that trial counsel effectively represented the defendant. *Brockob*, 159 Wn.2d at 345. Prejudice occurs when, but for the deficient performance, a reasonable probability exists that the trial outcome would have differed. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

Jury instructions are proper if they permit the parties to argue their case theories, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). The recklessness instruction that defense counsel proposed was taken directly from the second edition of the Washington Pattern Jury Instructions. The first sentence of this instruction is taken from RCW 9A.08.010(1)(c); the second sentence is from RCW 9A.08.010(2).

Ish argues that the instruction erroneously stated that recklessness "is . . . established if a person acts intentionally" without limiting the intentional acts from which the jury could infer recklessness. He relies on *State v. Goble*, 131 Wn. App. 194, 202-03, 126 P.3d 821 (2005), where we disapproved of a similar Washington Pattern jury instruction defining "knowledge." In *Goble*, the State had charged third degree assault against a law enforcement officer, which under the law of that case required proof that the defendant (1) intentionally assaulted the victim and (2) knew that the victim was a law enforcement officer performing his official duties. *Goble*, 131 Wn. App. at 200-01. We disapproved of an instruction that "[a]cting knowingly or with knowledge also is established if a person acts intentionally" because it suggested that the second element was met if the first element was satisfied. *Goble*, 131 Wn. App. at 202.

Ish reasons that the instruction here created a problem similar to that in *Goble* because it allowed the jury to presume that he recklessly inflicted substantial bodily harm on the victim if the jury found that he intentionally assaulted the victim. But in *State v. Keend*, 140 Wn. App. 858, 865-66, 166 P.3d 1268 (2007), we declined to extend *Goble* to the recklessness instruction in a second degree assault case. The instruction here was not misleading or a misstatement of the law. Thus, counsel was not ineffective in proposing it.

VI. SAG Issues

A. Timeliness of Arraignment and Speedy Trial

Ish argues that we should dismiss the information because he was detained without being arraigned for seven months and then for another 16 months between his arraignment and trial. His challenges arise under CrR 4.1, CrR 3.3, and the Sixth Amendment.

1. CrR 4.1 Arraignment

CrR 4.1(a)(1) provides that the court must arraign an incarcerated defendant not later than 14 days after the information is filed. Here, Ish was detained for seven months. But under CrR 4.1(b), a defendant who does not object to the arraignment date "at the time of the arraignment" loses the right to object. Ish's counsel did not object on the arraignment date, but to avoid the waiver problem, Ish argues that his counsel was ineffective for failing to object. To establish that his counsel was ineffective, Ish must show both that counsel's representation was deficient and that it prejudiced him. *Strickland*, 466 U.S. at 687.

Ish fails to show prejudice because of the remedy available if counsel had timely objected. Under CrR 4.1(b), Ish would have been entitled to change the "commencement date" for purposes of CrR 3.3(c) to the date he should have been arraigned. But under CrR 3.3(e)(1),[8] the entire seven months would have been excluded from the time allowed for trial anyway because they were used to conduct competency proceedings. Ish's ineffective assistance claim fails.

2. CrR 3.3 Time for Trial

Under CrR 3.3(c)(1), the "initial commencement date" for Ish's time for trial was October 20, 2005, the arraignment date. And Ish was entitled to trial within 60 days of the arraignment, or by December 19, 2005. CrR 3.3(b)(1)(i). But the next hearing documented in our record was on March 30, 2006. Our record contains no information as to what, if any, court appearances Ish

[8] This provision excludes from trial date computations "[a]ll proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent." CrR 3.3(e)(1). In this case, the trial court ordered a competency examination on March 30, 2005, and found Ish competent on October 20, 2005.

made during this time. Similarly, while the trial court later granted a continuance until July 10, 2006, the next hearing in our record was not until August 25, 2006. Again, our record does not show what happened in the intervening time. Yet, it is clear that Ish was appearing in court during this time; in April 2006, the parties agreed to a continuance in part because of an "ongoing evaluation of the defendant" and on August 25, the parties agreed to another continuance because defense counsel was waiting for Ish's out-of-state mental health records. Ish has the burden of supplying a record sufficient to prove the merit of his speedy trial claim. RAP 9.2(b). We are unwilling to assume from our partial record that the trial court failed to comply with the speedy trial rules.[9]

3. Sixth Amendment Speedy Trial Right

Ish also fails to show any constitutional violation from either his pre- or post-arraignment period delays. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI; *see also* Wash. Const. art. I, § 22. Even in the absence of arraignment, "the actual restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections of the speedy trial provision of the Sixth Amendment." *United States v. Marion*, 404 U.S. 307, 320, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). But the threshold for a constitutional speedy trial violation is much higher than that for a violation of the superior court rules. *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989). The inquiry "'necessitates a functional analysis of the right in the particular context of the case,'" including the length of the delay, the reason for the delay, whether the

[9] Assuming there is no procedural bar, Ish can make this claim by personal restraint petition supported by affidavits.

defendant asserted the right, and the prejudice to the defendant. *Fladebo*, 113 Wn.2d at 393 (quoting *Barker v. Wingo*, 407 U.S. 514, 522, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)). Here, the record is insufficient to allow us to do this intensely fact-specific inquiry. The only information regarding what occurred before arraignment is the prosecutor's explanation below that "[t]here was some delay" in (1) getting Ish out to Western State Hospital, (2) getting the evaluation done, and (3) conducting an independent expert evaluation the defense requested. RP (Oct. 20, 2005) at 3. And with regard to the missing post-arraignment continuances, we do not have a complete record of what, if any, continuances the court granted or the reasons for such continuances that resulted in the delay Ish complains of. Ish therefore fails to show a violation of the Sixth Amendment.

B. Lesser Included Instruction

Ish argues that the trial court erred in failing to instruct the jury on the lesser included offense of manslaughter on Count Two. Ish's counsel did not request such an instruction, and generally we do not consider issues raised for the first time on appeal. RAP 2.5(a). Ish also argues, however, that his counsel was ineffective in failing to do so, a constitutional issue that we may consider for the first time on appeal. *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000). But because manslaughter is not a lesser included offense of second degree felony murder, counsel was not ineffective in failing to offer such an instruction. *State v. Gamble*, 154 Wn.2d 457, 463-64, 114 P.3d 646 (2005).

C. Defective Information

Ish argues that the State's charging information was defective because it charged two

counts for the same crime in order to gain a tactical advantage by "broaden[ing] the essential elements of the crime, and [the] basis to convict the accused." SAG at 6.

First degree murder and felony murder are not different means of committing the same offense, nor are they greater and lesser offenses. *See In re Pers. Restraint of Lord*, 123 Wn.2d 296, 304, 868 P.2d 835 (1994). They are, rather, two different offenses. *Lord*, 123 Wn.2d at 304. The State is entitled to charge a defendant with alternative offenses for the same conduct, notwithstanding that double jeopardy may later prevent punishing the defendant on both. *State v. Womac*, 160 Wn.2d 643, 658, 160 P.3d 40 (2007). The charging information was not deficient.

D. Facts Not in Evidence During Closing Argument

Ish argues that the prosecutor committed misconduct by misquoting a witness during her closing argument, thereby arguing facts not in evidence. The challenged argument was that the numerous blows Ish inflicted on Katy showed that he had premeditated his decision to kill her. Ish's argument fails because the jury acquitted him of premeditated murder; any error was harmless.

E. Gruesome Autopsy Photos

Ish also argues that the prosecutor committed misconduct by showing graphic autopsy photographs of the victim to the jury during the testimony of the medical examiner, Dr. John Howard. The State had originally offered 124 autopsy photos, but the trial court admitted only 25. After Dr. Howard's testimony, the trial court commented out of the presence of the jury that the prosecutor had been "very careful" about giving the jury "a minimal amount of exposure" to the photographs by taking them down while she was questioning Dr. Howard on other issues. RP

(May 8, 2007) at 893. Ish has not included the photos in our record. Under these circumstances, Ish has not met his burden to show that the prosecutor's conduct was improper. His prosecutorial misconduct claim fails.

F. Offender Score

Ish argues that the trial court erred in using prior convictions to increase his offender score without doing a factual inquiry into whether the convictions were valid. We are unable to review this issue because the State's sentencing materials are not in the record. Thus, we do not know the factual basis for each conviction. For the same reason, we cannot review Ish's ineffective assistance of counsel claim for his attorney's failure to object to the lack of a comparability analysis on the record.

G. Sentence Outside Statutory Maximum

Ish argues that his sentence exceeds the statutory maximum of the crime because it includes imprisonment at the high end of the standard sentencing range and community custody of 48 months. This argument fails because the statutory maximum sentence for second degree felony murder is life imprisonment. RCW 9A.20.021(a); RCW 9A.32.050(2).

H. Presence at Sidebar Hearings

Ish argues that the trial court violated his right to be present under the Fourteenth Amendment and Federal Rules of Criminal Procedure 43 when it excluded him from sidebar hearings. Federal rules of criminal procedure do not apply in state court proceedings, so we consider only his constitutional argument.

A defendant has a fundamental right to be present when evidence is being presented and at proceedings where his or her presence has a "reasonably substantial relation to the fullness of his opportunity to defend against the charge." *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 432-33, 114 P.3d 607 (2005) (internal quotations omitted). A defendant does not, however, have a right to be present during in chambers or bench conferences between the court and counsel on legal matters. *Woods*, 154 Wn.2d at 433. Furthermore, the defendant need not be present when his "'presence would be useless, or the benefit but a shadow.'" *Woods*, 154 Wn.2d at 433 (quoting *State v. Rice*, 110 Wn.2d 577, 616, 757 P.2d 889 (1988) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106-07, 54 S. Ct. 330, 78 L. Ed. 674 (1934))). Ish does not explain what benefit his presence at sidebar hearings would have provided, nor is any prejudice apparent from the record; Ish's claim fails. *See Lord*, 123 Wn.2d at 307.

I. Ineffective Assistance of Counsel

Ish argues that his trial counsel ineffectively represented him by failing to obtain critical medical records from which to argue diminished capacity and self defense. Because we do not have the records, we cannot review the claim.

J. Jurisdiction

Ish argues that Washington lacked jurisdiction to prosecute him because he is a member of the Shoshone Bannock Tribe and was in Washington only because the state of Idaho unlawfully ordered him to attend a long-term drug and alcohol treatment facility in Seattle. The argument lacks merit; even if Ish was in Washington against his will, he was not immune from prosecution for crimes he committed here.

K. Cumulative Error

Ish argues that the cumulative effect of the trial errors materially affected the outcome of his trial. Under the cumulative error doctrine, a defendant is entitled to a new trial when several errors, though individually not reversible, cumulatively produced a trial that was fundamentally unfair. *Greiff*, 141 Wn.2d at 929. Ish has failed to demonstrate any errors. His cumulative error claim fails.

L. Double Jeopardy

Ish argues that the trial court erred by vacating the first degree manslaughter conviction on Count One instead of the second degree murder conviction because the former conviction occurred "first." SAG at 12. This argument fails because the remedy for a double jeopardy violation does not depend on the timing of the jury's verdicts; rather, the trial court must vacate

the one carrying the lesser sentence. *Weber*, 159 Wn.2d at 269.

Affirmed.

Armstrong, J.

We concur:

Bridgewater, J.

Penoyar, A.C.J.